Supreme Court, U.S.
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NO 05-688 NOV 21 2005

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT BROMLEY

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Are the Pennsylvania Sentencing Guidelines a violation of the protections conferred by the Sixth Amendment to the United States Constitution, as interpreted by ***United States v. Booker***, 125 S. Ct. 738 (2005).

LIST OF PARTIES

The names of all parties to the proceeding in the court for whose judgment review is sought here appear in the caption of the case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED II

LIST OF PARTIES III

TABLE OF CITATIONS IV

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 3

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 16

APPENDICES

Appendix A - Opinion and Order of the Superior Court of Pennsylvania, dated October 29, 2004. ..... 1a

Appendix B – Opinion in Support of Order of the Court of Common Pleas of the Sixth Judicial District of Pennsylvania, dated December 18, 2000. ..... 15a

TABLE OF CITATIONS

Cases Cited: *Page*

Apprendi v. New Jersey, 120 S. Ct. 2348 (2000).....9, 12, 13, 14

Blakely v. Washington, 124 S. Ct. 2531, 2540 (2004)***..10, 12, 15***

Commonwealth v. Arent, 508 A.2d 596 (Pa. Super. 1986).....*11*

Commonwealth v. Bromley, 862 A.2d 598, 603 (Pa. Super. 2004) *15*

Commonwealth v. Devers, 546 A.2d 12 (Pa. Super. 1988) *11*

Commonwealth v. Drumgoole, 491 A.2d 1352 (Pa. Super. 1985) *12*

Commonwealth v. Easterling, 509 A.2d 345 (Pa. Super. 1986) *12*

Commonwealth v. Eby, 784 A.2d 204 (Pa. Super. 2001).....*11*

Commonwealth v. Ennis, 574 A.2d 1116 (Pa. Super. 1990)...*11*

Commonwealth v. Gause, 659 A.2d 1017 (Pa. Super. 1995) .*11*

Commonwealth v. Martin, 351 A.2d 650 (Pa. 1976) *11*

Commonwealth v. Reid, 867 A.2d 1280 (Pa. Super. 2005) *13*

Commonwealth v. Smith, 863 A.2d 1172, 1177 - 78 (Pa. Super. 2004).....*10*

United States v. Booker, 125 S. Ct. 738 (2005)..8, 12, 13, 14, 15

Statutes Cited:

42 Pa.C.S. § 9701 *et seq*. 9

42 Pa.C.S. § 9712 9

42 Pa.C.S. § 9713 9

42 Pa.C.S. § 9717 9

42 Pa.C.S. § 9718 9

42 Pa.C.S. § 9719. 9

42 Pa.C.S. § 9721 10

42 Pa.C.S. § 9781 11

Regulations Cited:

204 Pa. Code § 303.1 et seq. 10

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No.

ROBERT L. BROMLEY,

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COMMONWEALTH OF PENNSYLVANIA,

Respondent

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

Joseph P. Burt, an Assistant Public Defender on the staff of the Erie County Pennsylvania Office of the Public Defender, on behalf of Robert L. Bromley, respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The Pennsylvania Supreme Court, Western District, issued an Order dated August 23, 2005, at 25 WAL 2005, 881 A.2d 818, which denied Petitioner's Petition for Allowance

of Appeal. The Pennsylvania Superior Court, Western District, filed an Opinion and Order dated October 29, 2004, 19[illegible]DA 2004, 862 A.2d 598 (Pa. Super. Ct. 2004), which affirmed the lower court's Order of sentence. Said Opinion and Order is reproduced herein at Appendix A. The Court of Common Pleas for the Sixth Judicial District of Pennsylvania, issued an Opinion In Support of its January 5, 2004, Order of sentence pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), which requires the filing of a Statement of Matters Complained of on Appeal. Said Opinion is reproduced herein at Appendix B.

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to Supreme Court Rule 10(c), 28 U.S.C. § 1257. On August 23, 2005, the Supreme Court of Pennsylvania denied Petitioner Robert Bromley's Petition for Allowance of Appeal, thereby leaving extant the Opinion and Order of the Superior Court of Pennsylvania of October 29, 2004. The decision of the Superior Court decided an important federal question in a way that conflicts with relevant decisions of this Court. This Petition has been filed within 90 days of the Order of the Pennsylvania Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part : "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

On November 4, 2003, Appellant pled guilty to one count of Possession With the Intent to Deliver Marijuana. The charge stems from Appellant delivering 2.0 grams of

marijuana to a confidential informant in Corry, Pennsylvania.

On January 5, 2004, Appellant was sentenced to fifteen (15) months to sixty (60) months incarceration. On January 21, 2004, Appellant filed a Motion to Reduce Sentence, which was denied by Order of the same date. A timely Notice of Appeal was filed.

As reflected in the Memorandum Opinion, the trial-level Judge relied on the following to support his aggravated range choice:

> Appellant has an extensive history of criminal activity, including substance abuse offenses dating back to 1988. Appellant was convicted herein for being in possession with the intent to deliver 2.0 grams of marijuana. This Court explained the reasoning for Appellant's sentence being in the aggravated range in Appellant's presence. The record reflects:
>
> > THE COURT: I read the presentence report in its entirety. I have also read the guidelines, listened to what has been presented here today, and I have a number of concerns, Mr. Bromley. I accept your representation you feel you have a drug problem. I accept your lawyer's representation that that may explain some of your other criminal behavior, but what I can't accept is your continued

unabated criminal behavior. It is just an incredible array of offenses since 1988, which include alcohol-related offenses.

ROBERT BROMLEY: Yeah, I used to be an alcoholic.

THE COURT: I don't know that anybody used to be an alcoholic.

ROBERT BROMLEY: Well, I don't drink no more.

THE COURT: You have a host of underage drinking convictions, you have property offenses, you have prior drug convictions, you have crimes of violence in your past. And you have been given every form of sanction from probation to fines and costs to time in Erie County Jail to time in county and state prison, and nothing really has stopped you. You just continue to commit crimes. There is only one conclusion I can draw from this history, is that unless you are incarcerated you are going to continue to commit crimes.

I note in the presentence report also this offense occurred in October of 2002. Since that time you have been arrested and bound over to court on similar type charges involving marijuana and possession with intent to deliver. I recognize you are presumed innocent of those offenses at this time, but at least as a judicial matter there's been found to be a prima facie case of those charges, which is not promising given your history.

So perhaps for your own good, because on your own you can't stop committing crimes, and for the protection of the community I have to impose a period of incarceration. I am going to do so in the aggravated range only to hold you accountable and get the message to you that you cannot continue to do what you have been doing. I am also going to authorize drug and alcohol treatment for you so that maybe you can use this opportunity differently than you have in your past stints in jail.

> At Count Two, Docket No. 1168 of 2003, I am going to impose a period of incarceration of 15 to 60 months, a fine—actually not going to impose a fine. Order restitution in the amount of $205, court costs, going to authorize [a] drug and alcohol evaluation [to] be a condition of his sentence, he [will] comply with any recommendations that flow from that. I will make it a condition of his sentence he secure a GED. And hopefully you'll come out of this sentence, Mr. Bromley, with a renewed outlook on life, with a GED and with a clean and sober outlook on life so maybe you can help out your three kids. Good luck.

(Transcript, January 5, 2004, pp. 8-10.)

Appellant has been in and out of the criminal system for over sixteen years. He has been given every form of sanction available and continues to engage in extensive criminal activities and substance abuse. Appellant has as a history of drug related offenses. Notably, Appellant has been arrested for similar charges of PWID marijuana subsequent to committing the offense at the current docket.

> Appellant's sentence in the aggravated range reflected the overriding concern of this Court to protect the community from Appellant's unremitting criminal behavior. Appellant has proven that unless he is incarcerated for an extended period of time, he is going to continue to commit crimes. This Court fashioned a sentence that would help Appellant become a stable and law-abiding father to his three children by making it a condition of sentence to secure his GED and by authorizing drug and alcohol treatment. Thus, adequate reasons were set forth on the record and there was not an abuse of discretion in imposing a sentence in the aggravated range.

REASONS FOR GRANTING THE WRIT

The reasons set forth herein are hereby submitted to be so important that a Writ of Certiorari should be granted. As the Memorandum Opinion of the Pennsylvania Superior Court illustrates, the panel rendered a decision that is, not in accord with an applicable decision of the United States Supreme Court, namely, ***United States v. Booker***, 125 S. Ct. 738 (2005). Thus, for that reason, and because the Opinions below reveal a widespread and consequential crisis of misinterpretation of the actual meaning and breadth of said case's doctrine, the instant case is so important and worthy of review that the need for a writ of certiorari transcends the simple fact that the Superior Court panel that ruled in 2004 erred. Absent reversal, the ruling of the panel -- in a reported case as to which Pennsylvania Supreme Court Review has been refused -- could lead to a dilution of the constitutional protections afforded to a person accused of a

crime, stemming from the Sixth Amendment of the United States Constitution as interpreted by this Court in ***Apprendi v. New Jersey***, 120 S. Ct. 2348 (2000) and its progeny.

Pennsylvania's Statutory and Regulatory Context

Understanding the essence of the Petitioner's claim will be promoted by a brief summary of pertinent Pennsylvania Sentencing law.

The Pennsylvania Sentencing Code is set forth at 42 Pa.C.S. § 9701 *et seq.*

Various statutes bind sentencing judges to enhancements and/or constraints in their discretion exercise, depending on the existence or non-existence of a fact. See, e.g.: 42 Pa.C.S. § 9712 (offenses committed with firearms); 42 Pa.C.S. § 9713 (offenses committed on public transportation); 42 Pa.C.S. § 9717 (offenses against elderly persons); 42 Pa.C.S. § 9718 (offenses against infant persons); 42 Pa.C.S. § 9719 (Offenses committed while impersonating a law enforcement officer. The foregoing, being creations of the General Assembly, which also – and properly so – sets statutory maxima for criminal offenses, in no way are affected by the Sixth Amendment concerns addressed herein. Similarly, no case law originating in this Court which considered Pennsylvania's mandatory minima has any bearing herein or relevance hereto.

Thus any opponent's citing of ***Commonwealth v. Mitchell***, 2005 Pa. Super. LEXIS 3438 (9/12/2005) would be erroneous, since said case considered only mandatory minima. As mentioned, they are creations of the general assembly which do not involve transferring fact-finding and "values-weighing" from a jury to a judge as Pennsylvania's guideline do.

The Pennsylvania Guidelines on Sentencing, in contrast, are regulations, found at 204 Pa. Code § 303.1 *et seq.*

In *Commonwealth v. Smith*, 863 A.2d 1172, 1177-1178 (Pa. Super. 2004), an "aggravated-range" 9of the guidelines) sentence was imposed for a sexual assault count. In reviewing the sentence the Pennsylvania Superior Court noted, citing 42 Pa.C.S. § 9721, that the sentencing code's statutes (which obviously "trump" the guidelines, which are regulations) require consideration of " . . . the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant." The Court found that the aggravated range sentence could stand only because of the following, presumably "special," circumstances: " . . . the age of the victim, the intimidation of the victims by appellant, and the abuse of the confidence given to him by one of the victims in a time of crisis."

The *Smith* court was decided prior to *Booker, supra*, but cited dictum in *Blakely v. Washington*, 124 S. Ct. 2531, 2540, to dispose of a *Blakely, supra*, challenge. Said dictum expressed opinion that no guidelines scheme which controls a minimum sentence can violate the right to trial by jury.

The error in said dictum is apparent. In Pennsylvania, no maximum sentence can be less than double the minimum sentence. Thus, any guidelines scheme which authorizes a minimum more than 50% of the "statutory maximum" would raise that statutory maximum. The immediately foregoing also illustrates that, and how, problems of semantics cloud the language found in the cases decided considering questions in the area under consideration here.

If a Pennsylvania sentencing judge chooses "he aggravated range" of the guidelines for reasons which are

impermissible sentencing factors, or for reasons which have already been fully weighted in the guidelines' Offense Gravity Score, or their Prior Record Score [***Commonwealth v. Arent,*** 508 A.2d 596 (Pa. Super. 1986); ***Commonwealth v. Eby,*** 784 A.2d 204 (Pa. Super. 2001)],the sentence is subject to reversal. Thus, despite statements frequently encountered in the Pennsylvania case law to the effect that "the guidelines are merely advisory," the guidelines delineate very definite limits to sentencing courts' exercise of discretion. That the guidelines are non-advisory is also made clear by 42 Pa.C.S. § 9781, which provides that a sentencing judge's "unreasonable" sentencing will escape appellate review unless the judge chooses to sentence above or below the outer bounds of the guidelines. If he or she stays within said bounds, only his or her "clearly unreasonable" sentences are subject to reversal.

Thus, the aggravated range sentence in the instant case would have been reversed if the sentencing judge had expressed no reason for choosing it, or if he had expressed an impermissible reason for choosing it [.***Commonwealth v. Ennis,*** 574 A.2d 1116 (Pa. Super.1990)] , or an irrelevant one. [***Smith, supra***]

Case law also makes clear that the General Assembly meant the appellate courts to use the guidelines to insure that policies of inter-county and inter-defendant consistency are maintained. ***Commonwealth v. Gause,*** 659 A.2d 1017 (Pa. Super. 1995)

Sentences in Pennsylvania must also be individualized. ***Commonwealth v. Devers,*** 546 A.2d 12 (Pa. 1988) For that reason, no "one-size-fits-all" sentence will escape reversal on appeal in Pennsylvania. ***Commonwealth v. Martin,*** 351 A.2d 650 (Pa. 1976)

Every Pennsylvania sentence must be grounded in a combination of considerations pertaining to the defendant's rehabilitative needs and the protection of the community. ***Commonwealth v. Drumgoole,*** 491 A.2d 1352 (Pa. Super. 1985); ***Commonwealth v. Easterling,*** 509 A.2d 345 (Pa. Super. 1986)

Sixth Amendment Constraints on State and Federal Guidelines Schemes, and How Pennsylvania's Scheme Violates Them

Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) was the start of a profound realization by this Court of the effect of, perhaps seemingly innocuous, delegations to sentencing judges powers to increase sentences for reasons extrinsic to the conduct prohibited by the substantive criminal statutes.

Blakely v. Washington, 124 S. Ct. 2531 (2004) showed that this court by then -- to its credit -- had realized that some "sentencing guidelines" systems run afoul of the Sixth Amendment in the same manner as did the "hate crimes" provision involved in ***Apprendi, supra***.

A perusal of the Opinion of the Superior Court of Pennsylvania will reveal that the judges of the panel never became aware of the crux of the Appellant's claim, to-wit, that ***United States v. Booker,*** 125 S. Ct. 738 (2005), [which applied the doctrine of ***Blakely v. Washington,*** 542 U.S. 296 (2004) to hold that federal sentencing guidelines can only be merely advisory], despite language in Opinions, of some members of the United States Supreme Court seemingly to the contrary effect, demonstrates that Pennsylvania's sentencing guidelines -- despite their being a sentencing scheme termed "indeterminate" -- calling as they do for a judge to make a factual determination that would dictate which "guidelines legal constraints" apply to said judge's

sentencing, violate the right to trial by jury guaranteed by the Sixth Amendment to the United States Constitution.

Tit should be noted -- since the argument might be made -- the one misinterprets the law one places his or her reliance on ***Commonwealth v. Reid***, 867 A.2d 1280 (Pa. Super. 2005) and said case's interpretation as to the holding of ***Apprendi v. New Jersey***, 530 U.S. 466 (2000). It is ***Booker, supra***, which authoritatively interprets ***Blakely, supra***, and ***Apprendi, supra***.

The logical necessity of the holding in ***United States v. Booker***, 125 S. Ct. 738 (2005), requires that the guidelines of Pennsylvania be held to be "merely advisory," like the federal sentencing guidelines. No dicta, be they by United States Supreme Court members or Pennsylvania Supreme Court members, change this. While courts may wish to limit the "reach" of their holdings, the inherent logic of their holdings cannot be limited by such wishes.

The sentencing judge in the instant case obviously believed, correctly, that the applicable legal constraints governing the aggravated range yielded by the Pennsylvania sentencing guidelines were determined by his own determination -- not a jury's determination or statements at a plea colloquy -- as to whether relevant sentencing considerations were present. Considerations to be used for an "aggravated range choice" must not have been already covered in the guidelines' weighting, and and must not have been impermissible.

The federal guidelines invalidated by ***Booker, supra***, guidelines were not part of a "determinate" sentencing scheme, even though the Washington sentencing scheme held unconstitutional in ***Blakely, supra***, was part of such a scheme: Thus, it is not a basis for distinguishing a state's

guidelines system to state that its scheme is not "determinate."

In ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), the United States Supreme Court held that a defendant's Sixth Amendment right to a jury trial [necessitates that] "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. ***Apprendi, supra,*** struck down a New Jersey statute that allowed for a sentence above the otherwise-applicable statutory maximum, if the trial court found by a preponderance of the evidence that the crime was motivated by racial animus. It is the subsequent, and perhaps surprising and unexpected, understanding of this holding that makes plain that the guidelines provision challenged here must fall.

In ***United States v. Booker***, 125 S. Ct. 738 (2005), the Court held that the Apprendi/Blakely rules apply to the federal sentencing guidelines, because said guidelines often call for the "constraints matrix" surrounding an individual's sentencing depend on a judge's making findings which should have and could have been charged and found by a jury to have been proven beyond a reasonable doubt. ***Booker, supra,*** therefore, requires the overturning of the Pennsylvania Guidelines' provision herein involved because the judicial decision mandated by the provision is fact-finding of elements which could have, and probably should have, been found by the jury. The result of the judge's mandated fact-finding is the raising of the sentencing opoint along the "guidelines-constraints-matrix".

Despite the Superior Court's holding that Blakely "does not implicate the Pennsylvania scheme, where there is no promise of a specific sentence, and a judge has discretion to sentence in the aggravated range so long as he or she provides reasons for the sentence." [***Commonwealth v.***

Bromley, 862 A.2d 598, 603 (Pa. Super. 2004)] that holding was not formulated with the benefit of ***Booker, supra***.

The panel here held that the Pennsylvania Guidelines' unconstitutionality is prevented, by the fact that they are part of an "indeterminate sentencing" scheme. In the ***Blakely, supra***, dissents are explanations why, by logical necessity, the majority's holding invalidates the federal sentencing guidelines. The same logic invalidates Pennsylvania's guidelines, at least insofar as the provisions challenged here are concerned.

Thus, the suggestion in some of the cases which followed, in time, the decisions in ***Blakeley, supra***, and in ***Booker, supra***, that the "type" of sentencing scheme, qua type, makes a constitution difference is, it is respectfully suggested, mere "wishful thinking." The decision in ***Booker, supra***, by logical necessity (despite some confusing language in some of the members' Opinions) leaves no doubt that "jury fact-finding beyond a reasonable doubt" is a U.S. Constitutional entitlement of every accused whose sentence is to be increased if finding of a non-objective or "value laden" fact vel non determines whether the increase occurs, or is authorized.

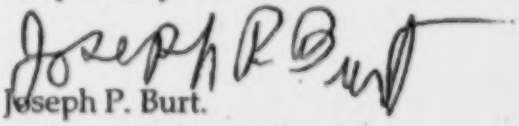
In the instant case, but for the "non-jury, non-beyond-a-reasonable-doubt", value-applying fact finding by the sentencing judge. The Pennsylvania Sentencing Guidelines would not have permitted an aggravated range sentence. Thus, the Petitioner's right to trial by jury was violated due to the guidelines' operation. Therefore, the panel should have reversed the sentencing Order of the Erie County Court of Common Pleas and remanded for

resentencing with the guidelines truly "advisory only."

CONCLUSION

For the reasons adduced above, this Court should grant certiorari in the instant case and reverse the decision of the court below.

Respectfully submitted,



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APPENDIX A - OPINION AND ORDER OF THE SUPIEROR COURT OF PENNSYLVANIA, DATED October 29, 2004

IN THE MATTER OF	:	IN THE SUPERIOR COURT
ROBERT L. BROMLEY	:	OF PENNSYLVANIA
Appellant	:	
	:	
vs.	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA:		
Appellee	:	No. 198 WDA 2004

Appeal from the Judgment of Sentence January 5, 2004
In the Court of Common Pleas of Erie County,
Criminal, No. 1168 of 2003

. . This is an appeal from the judgment of sentence entered in the Court of Common Pleas of Erie County following Appellant's guilty plea to one count of possession with intent to deliver.' N1 On appeal, Appellant challenges both the legality and discretionary aspects of his sentence, and claims that he received ineffective assistance of counsel at sentencing. We affirm.

On November 4, 2003, Appellant pleaded guilty to possession with intent to deliver marijuana. On January 5, 2004, Appellant was sentenced to fifteen to sixty months of

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N. 1 135 Pa.C.S. § 780-113(a)(30).

*Retired Justice assigned to the Superior Court.

incarceration which was in the aggravated range. Appellant filed a timely notice of appeal, and he was ordered to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Accordingly, Appellant filed his 1925(b) statement, and the sentencing court subsequently issued its opinion. N2

Appellant's first claim, raised for the first time in his brief, is that his sentence is illegal under the United States Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v. Arizona, 536 U.S. 584 (2002); and Blakely v. Washington, --- U.S. ---, 124 S.Ct. 2531 (2004). While, ordinarily, we would find a claim to be waived because it was not raised in Appellant's 1925(b) statement, a challenge to the legality of sentence is never waived and may be the subject of inquiry by the appellate court sua sponte. Commonwealth v. Pastorkovic, 567 A.2d 1089, 1091 (Pa.Super. 1989) (citations omitted). Accordingly, we find that Appellant's challenge to the legality of his sentence is not waived and will address it on the merits. However, for the reasons discussed below, we find Appellant's challenge to the legality of his sentence meritless.

Appellant argues that his sentence in the aggravated range was judicial determination of a non-objective fact not charged," and thus a violation of his Sixth

N. 2. We note that Appellant's 1925(b) statement was not timely filed. However, as the sentencing court's subsequent opinion addresses the issues raised therein, there is no impediment to our review. Commonwealth v. Ortiz, 745 A.2d 662 (Pa.Super. 2000).

Amendment right to trial by jury. We disagree.

In Apprendi, the United States Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 489. Accordingly, the Supreme Court held that a New Jersey sentencing scheme which allowed a ten-year enhancement to the maximum sentence if a judge found by a preponderance of the evidence, after a hearing, that the underlying crime was also a hate crime violated the Due Process Clause of the Fourteenth Amendment. Id. at 491-97.

Appellant here was not subjected to a sentencing scheme where a factor increased his sentence beyond the statutory maximum; he was not even sentenced beyond the guidelines. Rather, he received a sentence in the aggravated range. The Apprendi Court specifically stated:

> We should be clear that nothing . . . suggests that it is impermissible for judges to exercise discretion taking into consideration various factors relating to both offense and offender - in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentences within statutory limits in the individual case.

Apprendi, 530 U.S. at 481 (emphasis in original). Thus, Appellant's claim that his sentence runs afoul of the Apprendi decision is meritless.

In Ring, the Supreme Court held that capital defendants have a Sixth Amendment right to a jury determination of "any fact on which the legislature conditions an increase in their maximum punishment." Ring, 536 U.S. at 589 (emphasis in original). In so finding, the Supreme Court noted:

> The dispositive question . . . is one not of form but effect. If a State makes an increase in a defendant's authorized punishment contingent on a finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt. A defendant may not be expose[d] to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

Ring, 536 U.S. at 602 (internal citations omitted) (emphasis in original).

Here, Appellant was not a capital defendant, and there is simply nothing to show that Appellant's sentence does not accord with Ring. Appellant has not demonstrated that the sentencing court made an increase in his authorized punishment based upon a finding of fact. Appellant was sentenced within the range authorized by the sentencing guidelines, he was not exposed to a penalty exceeding the statutory maximum.

In Blakely, N3, the Supreme Court held that the

N. 3. "When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." Schriro v. Summerlin, --U.S. --, 124 S.Ct. 2519, 2523 (2004) (internal citation omitted).

Sixth Amendment was violated by Washington State's determinate sentencing scheme whereby a sentencing court could impose an "exceptional" sentence, above the standard-range statutory maximum, only after making a finding of "substantial and compelling reasons justifying an exceptional sentence." Blakely, — U.S. —, 124 S.Ct. at 2534 (internal citation omitted). Further, reasons which justify exceptional sentences can only be factors "other than those which are used in computing the standard range sentence for the offense." Id. In Blakely, the sentencing court departed upward from a standard range sentence for second-degree kidnapping based on its finding that the defendant acted with deliberate cruelty. Blakely, --- U.S. at ---, 124 S.Ct. at 2534. The Blakely Court specifically noted that indeterminate sentencing schemes:

> [I]ncreasen judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the fact essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that the judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence - and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says that judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence - and by reason of the Sixth Amendment the facts

> bearing upon that entitlement must be found by a jury.

Blakely, --- U.S. at ---, 124 S.Ct. at 2540 (emphasis in original).

It is well settled that Pennsylvania employs an indeterminate sentencing scheme. Commonwealth v. Walls, 846 A.2d 152, 155 (Pa.Super. 2004). As such, there are significant differences between Washington's sentencing scheme and Pennsylvania's which bear upon the applicability of Blakely in the instant matter. Pennsylvania law provides that a sentencing court can sentence a defendant to one or more of several alternative dispositions (probation, no penalty, partial confinement, total confinement, a fine, intermediate punishment), and may impose the sentence either consecutively or concurrently. 42 Pa.C.S.A. § 9721(a). The law provides that:

> (1)n selecting from the alternatives set forth in subsection (a) the court shall follow the general principle that the sentence imposed should call for confinement that Is consistent with the protection of the public, the gravity of the offense as It relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing and taking effect pursuant to section 2155 (relating to publication of guidelines for sentencing). In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the

> time of sentencing, a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence outside the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing pursuant to section, 2154 (relating to adoption of the guidelines for sentencing) and made effective pursuant to section 2155, the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines. Failure to comply shall be grounds for vacating the sentence and resentencing the defendant.

42 Pa.C.S.A. § 9721(b) (emphasis in original).

Thus, in the Pennsylvania scheme, unlike the Washington scheme, there is no requirement that a sentencing court make a specific finding prior to sentencing in the aggravated range. The sole requirements are that the judge follow the general principles outlined above and provide reasons for the sentence which he or she imposes.

In Blakely, the Supreme Court specifically distinguished between the judicial fact-finding in the determinate sentence scheme in Washington, and the exercise of judicial discretion which takes place in indeterminate sentencing schemes like Pennsylvania's. The significant finding of both Appreadi and Blakely appears to be that If a sentencing scheme mandates a certain sentence for a certain crime and only allows the Imposition of a greater sentence based upon specific factual findings about the underlying crime, then, unless those factual findings are made by the jury, the scheme runs afoul of the Sixth Amendment. Thus, we hold that Blakely does not

implicate the Pennsylvania scheme, where there Is no promise of a specific sentence, and a judge has the discretion to sentence In the aggravated range so long as he or she provides reasons for the sentence.

In the instant matter, the sentencing court based its decision to sentence in the aggravated range on Appellant's lack of any work history other than criminal activity, his history of drug and alcohol abuse, the failure of previous rehabilitative efforts, and the need to protect the community. N.T. 1/5/04 at 8-10. Thus, the sentencing court did not make any specific findings of fact about the underlying crime but rather exercised its discretion in the manner specifically approved in Apprendi, Ring, and Blakely. See Apprendl, 530 U.S. at 481; Ring, 536 U.S. at 602; Blakely, --- U.S. at ---, 124 S.Ct. at 2540.

Appellant next challenges the discretionary aspects of his sentence. Specifically, Appellant contends that: (1) the sentence was manifestly excessive; (2) the sentencing court did not provide a sufficient statement of reasons for exceeding the standard sentencing guidelines range; and (3) the sentencing court based the sentence on an impermissible factor or bias.

Prior to reaching the merits of Appellant's claims, we must first decide whether the claims are properly before us. It is well settled that an Appellant's challenge to the discretionary aspect of his sentence is waived if the Appellant has not filed a post-sentence motion challenging the discretionary aspects with the sentencing court. See Pa.R.A.P. 720(b)(1)(c); Commonwealth v. Mann, 820 A.2d 788 (Pa.Super. 2003) (issues challenging the discretionary aspects of sentence must be raised in post-sentence motion or by raising claim during sentencing proceedings; absent

such initiative, objection to the discretionary aspects of sentence waived on appeal).

> To reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether Appellant has filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether Appellant's brief has a fatal defect; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the sentencing code.

Commonwealth v. Petaccio, 764 A.2d 582, 586 (Pa.Super. moo) (internal citations omitted).

In the instant matter, Appellant's trial counsel filed a timely notice of appeal, but did not object at sentencing and did not file a post-sentence motion. However, Appellant, acting pro se, did file a motion for a reduction of sentence in which he generally challenged his sentence. The sentencing court accepted the motion for filing and then denied it. New counsel was appointed for appeal and raised the issues regarding the discretionary aspects of sentence in the 1925(b) statement. The sentencing court addressed the mrits of these issues in the 1925(a) opinion. Here, as Appellant did file a general post-sentence challenge to his sentence, as the sentencing court had the opportunity to address the merits of his specific claims in the 1925(a) opinion, and as the Commonwealth has also addressed the merits of Appellant's claims in its brief, we find that Appellant has preserved his challenge to the discretionary aspects of sentence.

> [S]entencing is a matter vested in the sound discretion of the sentencing judge, whose judgment will not be disturbed absent an abuse of discretion. Appellant challenges the discretionary aspects of sentencing for which there is no automatic right to appeal. This appeal is, therefore, more appropriately considered a petition for allowance of appeal. Two requirements must be met before a challenge to the judgment of sentence will be heard on the merits. First, the appellant must set forth in his brief a concise statement of reasons relied upon for allowance of appeal with respect to the discretionary aspects of his sentence. Second, he must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code.
>
> The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis.

Commonwealth v. Ritchey, 779 A.2d 1183, 1185 (Pa.Super. 2001) (citations omitted).

Appellant has filed a sufficient concise statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f). As such, where appropriate, we shall proceed to determine whether Appellant's issues raise a substantial question N. 4 and, If so, proceed to a

N. 4. We note that the Appellant in Mouzon, unlike Appellant in the instant matter, was sentenced outside the guidelines. Mouzon, at 427, 812 A.2d at 622-23.

discussion of the merits. Pa.R.A.P. 2119(f); Commonwealth v. Tuladziecki, 513 Pa. 508, 522 A.2d 17 (1987).

Appellant first claims that the sentence was manifestly excessive. In Commonwealth v. Mouzon, 571 Pa. 419, 812 A.2d 617 (2002) (plurality), the Pennsylvania Supreme Court held that a claim that a sentence, which Is within the statutory limits, is excessive can raise a substantial question. Id. at 435, 812 A.2d at 627-28. In order to raise a substantial claim, Appellant's 21199(f) statement must sufficiently articulate "the manner In which the sentence violates either a specific provision of the sentencing scheme set for forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process." Id. at 435, 812 A.2d at 627. Appellant here has neither argued that his sentence violated a specific provision of the sentencing scheme nor demonstrated that his sentence violated a fundamental norm underlying the sentencing process. Accordingly, we find that Appellant has failed to raise a substantial question that his sentence was manifestly excessive.

Appellant next claims that the sentencing court sentenced him in the aggravated range without placing adequate reasons on the record. This claim raises a substantial question and we will therefore address the merits of this claim. Commonwealth v. Brown, 741 A.2d 726, 735 (Pa.Super.1999).

Our review of the record belies the claim that the sentencing court failed to place sufficient reasons for the sentence on the record. Prior to announcing the sentence, in a lengthy statement, the sentencing court noted: (1) Appellant's extensive history of drug and alcohol abuse; (2) Appellant's sixteen-year record of criminal activity; (3)

that all previous sanctions including probation, fines, costs, and time served in both Erie County and Pennsylvania prisons had failed to rehabilitate Appellant; (4) the fact that, while charges were pending on the instant matter, Appellant was arrested and bound over for trial on new possession with intent to deliver charges; and (5) the need to protect the community from Appellant's criminal activities. N.T. 1/5/04 at 8-10. Here, the sentencing court adequately stated its reasons for sentencing Appellant in the aggravated range, and we find that the record substantiates the sentencing dourt's sentencing determinations.

Appellant claims that the sentencing court based the sentence on an impermissible factor or bias. It is well settled that that a claim that the sentencing court relied on impermissible factors in sentencing raises a substantial question. Commonwealth v. Kraft, 737 A.2d 755 (Pa.Super.1999). Thus, we will consider the merits of Appellant's challenge.

Here, Appellant has failed to point to any specific impermissible factor that was relied on by the sentencing court and has produced nothing to support his general claim that the sentencing court was biased. We have thoroughly reviewed the transcript of the sentencing hearing and find nothing to show that the sentencing court either relied on an impermissible factor or was biased against Appellant. Accordingly, this claim must fail.

Lastly, Appellant claims that he received ineffective assistance of trial counsel because counsel failed to preserve his sentencing claims for review. Prior to the addressing the merits of Appellant's claim, we must first decide whether it is properly before us.

In Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (2002), the Pennsylvania Supreme Court stated that, "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." Id. at 67-68, 813 A.2d at 739. The Supreme Court noted that an exception to the general rule may be created when there has been a complete or constructive denial of counsel or that counsel has breached his or her duty of loyalty. Grant, at 67, 813 A.2d at 738 n,14. In addition, the appellate courts have carved out limited exceptions to the general rule set forth In Grant. For example, we will address ineffective assistance of trial counsel claims on direct appeal where the appellant would not be entitled to collateral relief due to the short duration of his sentence. Commonwealth v. Salisbury, 823 A.2d 914 (Pa.Super. 2003), and where the ineffectiveness claim was raised in a timely post-sentence motion, developed at a hearing, and ruled upon by the trial court, Commonwealth v. Bomar, 573 Pa. 426, 826 A.2d 831 2003; Commonwealth v. Hudson, 820 A.2d 720 (Pa.Super. 2003). Moreover, this Court has recently addressed an ineffective assistance of trial counsel claim on direct appeal where the evidentiary record was complete and there was a trial court opinion addressing the claim. Commonwealth v. Causey, 833 A.2d 165 (Pa.Super. 2003) (holding that Grant did not require dismissal of a claim that counsel was ineffective in failing to challenge sufficiency of the evidence where the record was complete and trial court drafted an opinion addressing this claim). We have also found an exception to Grant's general rule where the ineffectiveness claim was discussed in a Pa.R.A.P. 1925(a) opinion, which addressed the merits of the claim and specifically indicated that the existing record was sufficiently developed for resolution of the claim. Commonwealth v. Watson, 835 A.2d 786 (Pa.Super. 2003).

In the instant matter, Appellant's claim was raised in his 1925(b) statement, the sentencing court discussed it in the 1925(a) opinion and specifically stated that the record was sufficiently developed for resolution of the claim. Accordingly, we find that Appellant's ineffective assistance of counsel claim is properly before us. Id.

The legal standard applicable to Ineffective assistance of counsel claims Is well settled. To prevail on a claim that counsel was constitutionally ineffective, the appellant must overcome the presumption of competence by showing that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and, (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different. A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. Commonwealth v. Wharton, 571 Pa. 85, 98-99, 811 A.2d 978, 986 (2002) (citations omitted). N. 5. Here, as we have

N. 5. The standard applicable to claims of ineffective assistance of counsel raised on direct appeal is the same as that applied to such claims raised under the PCRA. Commonwealth v. Kimball, 555 Pa. 299, 724 A.2d 332 1999).

held that Appellant's challenges to his sentence were (1) properly preserved for appellate review, and (2) utterly lacking in merit, his ineffective assistance of counsel claim must fall.

Judgment of sentence affirmed.

APPENDIX B. - OPINION AND ORDER OF THE COURT OF COMMON PLEAS OF THE SIXTH JUDICIAL DISTRICT OF PENNSYLVANIA, DATED, April 19, 2004

IN THE MATTER OF	:	IN THE SUPERIOR COURT
ROBERT L. BROMLEY	:	OF PENNSYLVANIA
Appellant	:	
	:	
vs.	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA	:	
Appellee	:	No. 198 WDA 2004

Before the Court is an appeal from the denial of Appellant's Motion to Reduce Sentence. As this appeal is without merit, it must be dismissed.

PROCEDURAL/FACTUAL HISTORY

On November 4, 2003, Appellant pled guilty to one count of Possession With the Intent to Deliver Marijuana. The charge stems from Appellant delivering 2.0 grams of marijuana to a confidential informant in Corry, Pennsylvania.

On January 5, 2004, Appellant was sentenced to fifteen (15) months to sixty (60) months incarceration. On January 21, 2004, Appellant filed a Motion to Reduce Sentence, which was denied by Order of the same date.

On February 4, 2004, Appellant filed a Notice of Appeal. On February 19, 2004, Appellant filed a Preliminary Statement of Matters Complained of On Appeal along with a Petition for Extension of Time Within Which to File Amended Statement of Matters. By Order dated February 23, 2004, Appellant was granted 10 days after the transcripts were filed in which to file an Amended Statement of Matters Complained of on Appeal. Transcripts were completed and filed by February 23, 2004. Appellant filed an untimely Final Statement of Matters Complained of on Appeal on March 15, 2004. Nonetheless, appellant's issues will be addressed on the merits.

DISCUSSION

Appellant asserts his sentence was manifestly excessive and unreasonable because: (1) there were no adequate reasons expressed to explain the imposition of the sentence in the aggravated range; (2) certain mitigating factors were not considered; (3) there had to have been one or more impermissible considerations or bias, prejudice, or ill-will as the basis for the sentence; and (4) trial counsel was ineffective for not filing an adequate post-sentence motion.

Appellant's first three assertions challenge the discretionary aspects of his sentence. The threshold inquiry is whether the Appellant has raised a "substantial question" permitting appellate review. Commonwealth v. Maneval, 688 A.2d 1198 (Pa. Super. 1997). "A substantial question exists where the statement sets forth a plausible argument that the sentence violates a particular provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing scheme." Commonwealth v. McNabb, 819

A.2d 54, 56 (Pa. Super. 2003) citing Commonwealth v. Mouzon, 812 A.2d 617 (Pa. 2002); Commonwealth v. Maneval, supra. "An allegation that a sentencing court 'failed to consider' or 'did not adequately consider' certain factors does not raise a substantial question that the sentence was inappropriate. Such a challenge goes to the weight accorded the evidence and will not be considered absent extraordinary circumstances." Commonwealth v. Pettaccio, 764 A.2d 582, 587 (Pa. Super. 2000). Also, "where a pre-sentence report exists, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those along with mitigating statutory factors." Id.

Appellant has failed to raise a "substantial question" preserving appellate review of his assertion that certain mitigating factors were not considered. Thus, Appellant's claim must be dismissed.

Appellant has preserved appellate review of his first assertion that adequate reasons were not placed on the record to explain the sentence imposed. See Commonwealth v. Simpson, 829 A.2d 334 (Pa. Super. 2003)(the court held a defendant's challenge that his sentence is unlawful because the trial court failed to sufficiently state its reasons for imposing the sentence raises a substantial question for appeal). However, the record does not support Appellant's claim.

Appellant has an extensive history of criminal activity, including substance abuse offenses dating back to 1988. Appellant was convicted herein for being in possession with the intent to deliver 2.0 grams of marijuana. This Court explained the reasoning for

Appellant's sentence being in the aggravated range in Appellant's presence. The record reflects:

> THE COURT: I read the presentence report in its entirety. I have also read the guidelines, listened to what has been presented here today, and I have a number of concerns, Mr. Bromley. I accept your representation you feel you have a drug problem. I accept your lawyer's representation that that may explain some of your other criminal behavior, but what I can't accept is your continued unabated criminal behavior. It is just an incredible array of offenses since 1988, which include alcohol-related offenses.
>
> ROBERT BROMLEY: Yeah, I used to be an alcoholic.
>
> THE COURT: I don't know that anybody used to be an alcoholic.
>
> ROBERT BROMLEY: Well, I don't drink no more.
>
> THE COURT: You have a host of underage drinking convictions, you have property offenses, you have prior drug convictions, you have crimes of violence in your past. And you have been given every form of sanction from probation to fines and costs to time in Erie County Jail to time in county and state prison, and nothing really has stopped you. You just continue to commit crimes. There is only one conclusion I can draw from this history, is that

unless you are incarcerated you are going to continue to commit crimes.

I note in the presentence report also this offense occurred in October of 2002. Since that time you have been arrested and bound over to court on similar type charges involving marijuana and possession with intent to deliver. I recognize you are presumed innocent of those offenses at this time, but at least as a judicial matter there's been found to be a prima facie case of those charges, which is not promising given your history.

So perhaps for your own good, because on your own you can't stop committing crimes, and for the protection of the community I have to impose a period of incarceration. I am going to do so in the aggravated range only to hold you accountable and get the message to you that you cannot continue to do what you have been doing. I am also going to authorize drug and alcohol treatment for you so that maybe you can use this opportunity differently than you have in your past stints in jail.

At Count Two, Docket No. 1168 of 2003, I am going to impose a period of incarceration of 15 to 60 months, a fine—actually not going to impose a fine. Order restitution in the amount of $205, court costs, going to authorize [a] drug and alcohol evaluation [to] be a condition of his sentence, he [will] comply with any recommendations that flow from that. I will make it a condition of his sentence he secure a GED. And hopefully you'll come out of this

sentence, Mr. Bromley, with a renewed outlook on life, with a GED and with a clean and sober outlook on life so maybe you can help out your three kids. Good luck.

See Sentencing Transcript, January 5, 2004, pp. 8-10.

Appellant has been in and out of the criminal system for over sixteen years. He has been given every form of sanction available and continues to engage in extensive criminal activities and substance abuse. Appellant has as a history of drug related offenses. Notably, Appellant has been arrested for similar charges of PWID marijuana subsequent to committing the offense at the current docket.

Appellant's sentence in the aggravated range reflected the overriding concern of this Court to protect the community from Appellant's unremitting criminal behavior. Appellant has proven that unless he is incarcerated for an extended period of time, he is going to continue to commit crimes. This Court fashioned a sentence that would help Appellant become a stable and law-abiding father to his three children by making it a condition of sentence to secure his GED and by authorizing drug and alcohol treatment. Thus, adequate reasons were set forth on the record and there was not an abuse of discretion in imposing a sentence in the aggravated range.

Appellant also asserts there was one or more impermissible considerations, or even bias prejudice or as the basis for his sentence. A claim that the sentence is excessive because this Court allegedly relied on impermissible factors raises a substantial question.

Commonwealth v. McNabb, 819 A.2d 54, 56 (Pa. Super. 2003). Thus, Appellant has preserved this claim for appellate review. However, Appellant has failed to specifically set forth what factors were impermissibly considered. The ambiguity of Appellant's claim makes it difficult for this Court to provide an adequate response. Therefore, this issue is waived. Commonwealth v. Dowling, 778 A.2d 683 (Pa. Super. 2001).

Assuming *arguendo* Appellant's claim is not waived, it must fail on the merits. It is clear from the record that this Court did not consider any impermissible factors in fashioning Appellant's sentence, nor was there any bias, prejudice or toward Appellant. There was no abuse of discretion by this Court in weighing the facts of the crime and Appellant's character in fashioning his sentence. Thus, Appellant's claim must be dismissed.

Appellant additionally asserts ineffective assistance of trial counsel based on the contention he may have been prevented from direct appellate review of the issues herein because trial counsel did not file a post-sentence motion. This claim must fail on the merits.

As a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review. Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002).1 However, ineffectiveness claims are addressed on direct appeal where there is an adequate record to do so. Commonwealth v. Causey, 833 A.2d 165 (Pa. Super. 2003). The record in the present case is sufficient for this Court to address Appellant's claims.

In order to demonstrate that counsel ineffectively represented him, Appellant must satisfy a three-prong test. There must be merit to the underlying claim; counsel must

have no reasonable basis for his or her conduct; and Appellant must demonstrate there is a reasonable probability that, but for counsel's action or omission, the outcome of the proceeding would have been different. Commonwealth v. Hawkins, 787 A.2d 292, 296 (Pa 2001); Commonwealth v. Holloway, 739 A.2d 1039, 1044 (Pa. 1999). If an appellant fails to satisfy one of the prongs of the test, the reviewing court cannot find that trial counsel was ineffective. Commonwealth v. Shaffer, 763 A.2d 411 (Pa. Super. 2000).

While it is not apparent from the record whether Appellant requested trial counsel to file any such post-sentence motion, in arguing that counsel was ineffective for failing to specifically file, Appellant ignores the fact that Appellant filed a pro se Motion to Reduce Sentence. This pro se motion was filed by Appellant on January 21, 2004 and the same was considered and denied on the merits by Order of this Court on the same day. Thus, to now claim counsel was ineffective for not filing the requested motion Appellant would seemingly have to demonstrate that a motion filed by counsel, as opposed to the pro se motion would have made a favorable outcome likely.

Appellant has not demonstrated that but for trial counsel's failure to file an amended post-sentence motion, the outcome would have been different. See Commonwealth v. Hawkins, 787 A.2d 292, 296 (Pa. 2001); Commonwealth v. Holloway, 739 A.2d 1039, 1044 (Pa. 1999). Appellant has not established grounds existed to reduce his sentence that were omitted from his pro se motion and within defense counsel's knowledge, which would have likely resulted in the granting of the motion had they been included.

Moreover, Appellant has not been prevented from appellate review of his current issues as they have been addressed by this Court herein. Thus, Appellant's claim of ineffective assistance of counsel must be dismissed.

CONCLUSION

For the reasons set forth in this Opinion, this Appeal must be denied.